

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF NEW YORK

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IN RE:

THE BENNETT FUNDING GROUP, INC.

Debtors

CASE NO. 96-61376

Chapter 11

Substantively Consolidated

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APPEARANCES:

KAYE SCHOLER, LLP

Special Counsel to § 1104 Trustee

425 Park Avenue

New York, New York 10022-3598

ARTHUR STEINBERG, ESQ.

Of Counsel

GUY A. VAN BAALEN, ESQ.

Assistant U.S. Trustee

10 Broad Street

Utica, New York 13501

Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

**MEMORANDUM-DECISION, FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER**

The Court considers, as of the date hereof, all of the pending interim fee applications of Kaye Scholer, LLP ("KS")<sup>1</sup> more particularly described as follows:

**Arthur Andersen Litigation:**

1. Final Interim Application ("Final Application/Andersen") filed September 18, 2002, covering the period June 1, 2002 through June 28, 2002.

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<sup>1</sup> The Court has included in this Decision the First Post-Effective Date Application of KS relating to the Arthur Andersen litigation and covering the period June 28, 2002 through December 31, 2002, for information purposes only. The Court made a final ruling on that Application by virtue of an Order dated June 4, 2003.

Fees Requested: \$6,237.60

Expense Reimbursement: \$276.13

Hearing on Application held: January 30, 2003

2. First Post-Effective Date Application (“Post-Effective Date/Andersen”) filed February 24, 2003 covering the period June 28, 2002 through December 31, 2002.

Fees Requested: \$72,131.85

Expense Reimbursement: \$1,827.80

Final Fees and Expenses Awarded: \$62,131.85 fees and \$1,827.80 expenses pursuant to Order dated June 4, 2003.

**Early Investor Litigation:**

1. Second Interim Application (“Second Application/Early Investor”) filed June 10, 1999, covering the period October 1, 1998 through April 30 1999.

Fees Requested: \$89,410.50

Expense Reimbursement: \$3,424.91<sup>2</sup>

Hearing on Application held: July 8, 1999

Provisional Fees and Expenses Awarded: \$70,348 fees and \$3,374.16 expenses pursuant to Order dated July 9, 1999.

2. Third Interim Application (“Third Application/Early Investor”) filed April 21, 2000

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<sup>2</sup> KS voluntarily reduced the Second Application/Early Investor by \$4,415.50 in fees and \$50.75 in expenses finally seeking \$84,995 in fees and \$3,374.16 in expenses.

covering the period “after May 1, 1999.”<sup>3</sup>

Fees Requested:\$30,626.06

Expense Reimbursement:\$1,713.25

Hearing on Application held: May 11, 2000

Provisional Fees and Expenses Awarded: \$24,188.46 fees and \$1,713.25 pursuant to Order dated May 17, 2000.

3. Final Interim Application (“Final Application/Early Investor”) filed May 11, 2000.<sup>4</sup>

Fees Requested: \$ 2,502.45

Expense Reimbursement: \$621.41

Hearing on Application held: May 11, 2000

Provisional Fees and Expenses Awarded: \$1,700 fees and \$621.41 expenses pursuant to Order dated May 17, 2000.

Objections to the various pending Fee Applications were filed by the U.S. Trustee who cited the inclusion of clerical services, time devoted to the preparation and defense of KS’s fee applications and, in the case of the Arthur Andersen litigation, the complete lack of any tangible benefit to the Debtors’ consolidated estates notwithstanding the millions of dollars in litigation costs.

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<sup>3</sup> The Third Application/Early Investor actually covered the period May 1, 1999 through April 18, 2000.

<sup>4</sup> The Final Application/Early Investor was actually contained in the Affidavit of Arthur Steinberg, Esq filed in support of the Third Application/Early Investor and covered the period April 18, 2000 through May 3, 2000.

## **JURISDICTIONAL STATEMENT**

The Court has core jurisdiction over the subject matter of these contested matters pursuant to 28 U.S.C. §§ 1334(b) and 157(a),(b)(1) and (b)(2)(A) and (O).

## **FACTS and DISCUSSION**

KS was appointed pursuant to an Order of this Court dated February 26, 1998, to represent the Official Early Investors Committee. Thereafter, KS was appointed pursuant to an Order of this Court dated August 28, 2000, to act as special counsel to the Trustee in pending litigation against Arthur Andersen & Co. The Court has had the opportunity to finally review all of the remaining Fee Applications referred to above and concludes that the only further adjustments required to be made involve the time devoted by KS to the preparation and defense of their various fee applications. In keeping with the Court's so-called 3% rule as announced in its Memorandum-Decision and Order issued in this case on February 19, 1998 at page 16, services which are devoted to the sole purpose of preparing and defending the professional's fee applications provide no direct benefit to any party other than the professional. Accordingly, it is the position of this Court that they must be allowed only to a limited extent. While the Court has not steadfastly adhered to the 3% rule in instances where it would work an unjust result on the professional, it has, for the most part, been an overriding consideration in dealing with the millions of dollars applied for and awarded to the multitude of professionals appointed in this chapter 11 case over the past eight years.

Accordingly, the Court will make the following final awards:

Final Application/Andersen: The Court notes that in this Final Application/Andersen period, KS has included \$4,163 for services devoted exclusively to the preparation/defense of its fee applications. The Court will allow 35% of those fees or \$1,457 while disallowing \$2,706. Thus, the Court makes a final fee award of \$3,531.60. The Court will make no adjustment to expense reimbursement and make a final award of \$276.13.

Second Application/Early Investor: The U.S. Trustee asserted, without objection, in limited opposition to the Second Application/Early Investor, that KS had included \$16,647 for services devoted to its fee applications. The Court will award KS 35% or \$5,826 of its fees incurred in connection with the preparation/defense of fee applications as reflected in the Second Application, thus finally disallowing \$10,821 in fees requested. The Court, therefore, makes a final award of fees on the Second Application of \$74,174. Crediting the consolidated Debtors with payment of the provisional fee award of \$70,348, KS shall receive the balance of fees in the amount of \$3,826. Full reimbursement of expenses was made in the Order of July 9, 1999.

Third Application/Early Investor: In its Third Application KS noted that it had billed \$7,630.80 in connection with preparing its Second and Third Interim Fee Applications. Applying a 35% eligibility factor the Court will award \$2,671 and disallow \$4,959.80. Thus, the Court makes a final award of fees on the Third Application/Early Investor of \$25,666.26. Crediting the consolidated Debtors with the payment of the provisional fee award of \$24,188.46, KS shall receive the balance of fees in the amount of \$1,477.80. Full reimbursement of expenses was made in the Order of May 17, 2000.

Final Application/Early Investor: The Court notes that the entire amount of fees contained in this Final Application were incurred in connection with KS's support of its Third Application to include some \$1,200 which was estimated to be incurred in preparing for, traveling to and attending the hearing held on May 11, 2000. If the Court were to allow 35% of the \$2,502.45 requested (\$876), the resulting disallowance (\$1,626) would require disgorgement of a portion of the provisional fee award made in the Order of May 17, 2000. The Court will not require disgorgement. Full reimbursement of expenses was made in the Order of May 17, 2000.

Based upon the foregoing, the net fees and expenses as finally allowed herein shall be paid from the unencumbered assets of the consolidated Debtors' estate.

IT IS SO ORDERED

Dated at Utica, New York

this 19th day of May 2004

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STEPHEN D. GERLING  
Chief U.S. Bankruptcy Judge